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9 **Attorneys for Defendants**

10 CHINA BOWL, INC. erroneously sued
11 herein as "CHINA BOWL (Owner QUAN
12 HE HAN)" and QUAN HE HAN

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

16 SHU SEN LU,

17 Plaintiff,

18 v.

19 CHINA BOWL (Owner, QUAN HE
20 HAN),

21 Defendants.

Case No. C 07 4951 EDL

**DEFENDANTS CHINA BOWL, INC. AND
QUAN HE HAN'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO DISMISS**
(Fed. R. Civ. P. 12(b)(2)(3) & (6).)

Date: January 30, 2008

Time: 2:00 p.m.

Ctrm: E

The Honorable Elizabeth D. Laporte

Complaint Filed: September 25, 2007

Defendants CHINA BOWL, INC. ("CHINA BOWL") and QUAN HE HAN ("HAN")
submit this memorandum of points and authorities in support of their motion to dismiss
pursuant to Federal Rules of Civil Procedure 12(b)(2) (personal jurisdiction), 12(b)(3)
(venue) and 12(b)(6) (failure to state a claim).

I. INTRODUCTION

CHINA BOWL is a Montana corporation with its principal and only place of
business in Missoula, Montana. It is a small Chinese restaurant with significantly less
than 20 employees working at its one and only restaurant location in Missoula, Montana.
It has never done business in California or had any other contact with the state.

1 HAN is one of the two sole officers, directors and shareholders of CHINA BOWL,
 2 the other being his wife. HAN has never done business in California or had any other
 3 contact with the state save a brief vacation many years ago.

4 Plaintiff SHU SEN LU ("LU") was an employee of CHINA BOWL in the position of
 5 Deep Fryer from October 2001 to September 2006. While an employee, he filed an age
 6 discrimination claim against CHINA BOWL with the appropriate state agency in Montana.
 7 The claim was investigated, rejected, appealed and ultimately dismissed. Seven days
 8 after the claim was dismissed, LU claimed injury during the course and scope of his
 9 employment with CHINA BOWL. He submitted a claim for workers' compensation and
 10 never returned to work. All of LU'S employment records, as well as the administrative
 11 records pertinent to his first age discrimination claim are maintained in Montana.

12 Thereafter, while still in Montana, LU filed essentially the same claim of age
 13 discrimination against CHINA BOWL with the Equal Employment Opportunity
 14 Commission ("EEOC") in San Francisco. LU ultimately received a Notice of Right to
 15 Sue letter after which he filed this action.¹

16 CHINA BOWL and HAN now file this motion to dismiss pursuant to Federal Rule
 17 of Civil Procedure 12(b)(2) because the court lacks personal jurisdiction, Rule 12(b)(3)
 18 because venue is improper under Title VII, and Rule 12(b)(6) because the Age
 19 Discrimination in Employment Act of 1967 ("ADEA") does not apply to an employer with
 20 less than 20 employees.

21 II. FACTUAL AND PROCEDURAL BACKGROUND

22 A. LU'S Employment At CHINA BOWL

23 LU was an employee of CHINA BOWL from October 2001 to September 2006.
 24 He held the position of Deep Fryer. All records pertinent to LU'S employment are
 25 maintained at CHINA BOWL'S sole location in Missoula, Montana.

26 ///

27 ¹ LU filed a second action against CHINA BOWL and HAN in this court on September 26, 2007, the day
 28 following the filing of this action. The case is styled Han v. China Bowl, case no. C 07 4979 MMC. Per
 the electronic docket report, a summons has yet to be issued in this second action.

1 **B. LU'S First Claim Of Age Discrimination**

2 In November 2005, LU filed a claim of age discrimination against CHINA BOWL
3 with the Department of Labor and Industry in Montana. The investigation concluded
4 that LU'S claim was without merit. LU filed objections with the Montana Human Rights
5 Commission. After considering the objections on September 20, 2006, LU'S objections
6 were overruled and his claim dismissed giving him 90 days within which to file a civil
7 action in district court. All records pertinent to this first claim of age discrimination are
8 maintained by the Department of Labor and Industry and the Montana Human Rights
9 Commission both of which are in Montana.

10 **C. LU Returns To Work Following Rejection Of His Claim For Age**
11 **Discrimination**

12 On September 27, 2006, one week after his first age discrimination claim was
13 dismissed, LU claimed injury during the course and scope of his employment with
14 CHINA BOWL. He filed a claim for workers' compensation benefits. Thereafter, he
15 never contacted anyone at CHINA BOWL and never returned to work. Thus, CHINA
16 BOWL did not terminate his employment; LU abandoned his employment.

17 **D. LU'S Second Claim Of Age Discrimination**

18 On April 23, 2007, while still residing in Missoula, Montana, LU filed essentially
19 the same claim of age discrimination against CHINA BOWL, this time with the EEOC in
20 San Francisco. The only substantive difference was that LU was now claiming that he
21 had been terminated. The EEOC issued its Notice of Right to Sue letter on July 17,
22 2007. LU filed his complaint in this court on September 25, 2007.

23 The complaint sets forth the acts and omissions for which retribution is sought
24 from CHINA BOWL and HAN in paragraphs 4 through 7, inclusive. The complaint
25 alleges claims of age discrimination and retaliation. LU claims harassment and
26 disparate treatment by reason of age, followed by a retaliatory termination for
27 complaining to the appropriate authorities in Montana. All of the foregoing occurred
28 between July 2002 and September 2006, dates which encompass LU'S employment at

1 CHINA BOWL, i.e., all of the allegedly wrongful conduct occurred during the course and
2 scope of LU'S employment at the CHINA BOWL restaurant in Missoula, Montana.

3 The complaint was ultimately served by a U.S. Marshall in Missoula, Montana on
4 November 16, 2007.

5 **E. CHINA BOWL And HAN Have No Contacts With California**

6 The factual background relevant to CHINA BOWL'S operations is before this
7 court largely through the declaration of HAN, one of the two sole officers, directors and
8 shareholders of CHINA BOWL. HAN has been with CHINA BOWL since its
9 incorporation in 2002. He has firsthand knowledge of CHINA BOWL'S' operations.

10 CHINA BOWL'S only business is that of a small Chinese restaurant with a single
11 site located at 3445 American Way, Missoula, Montana 59808. It employs
12 approximately 12 part- and full-time employees. CHINA BOWL is a Montana
13 corporation with its principal place of business at its sole restaurant in Missoula,
14 Montana. It was incorporated in or around March 2002. HAN and his wife, both of
15 whom are domiciled outside of California, in Montana, are the sole officers, directors
16 and shareholders of CHINA BOWL.

17 CHINA BOWL and HAN have never been qualified or attempted to qualify to do
18 business in California. They have no subsidiaries incorporated or qualified to do
19 business in California. CHINA BOWL and HAN have no current employees residing or
20 domiciled in California; nor has either contracted with persons residing in California to
21 act on their behalf with respect to marketing, distributing or servicing any of its goods or
22 services. CHINA BOWL and HAN have no branch offices or comparable facilities in
23 California, and have no telephone listings or mailing addresses in California. CHINA
24 BOWL and HAN have no bank accounts or other tangible personal or real property in
25 California. CHINA BOWL and HAN do not direct any advertising specifically toward
26 California residents, nor do they advertise in any publications that are directed primarily
27 toward California residents. No meetings of CHINA BOWL'S board of directors or
28 shareholders have been in California; and none of its officers or directors have

1 attended business conferences or similar functions within the state. CHINA BOWL and
2 HAN have never paid to or collected taxes for the State of California with the sole
3 exception of sales tax paid by HAN many years ago while in California on a brief
4 vacation. CHINA BOWL and HAN have no registered agents for service of process in
5 California and have never initiated litigation in the State of California. With the
6 exception of the pending action, CHINA BOWL and HAN have never participated in
7 litigation filed in California. In summation, CHINA BOWL and HAN have no contact of
8 any kind with the State of California, nor have they ever had any contact of any kind
9 with the State of California with the sole exception being the short vacation taken in
10 California by HAN many years ago.

11 III. ARGUMENT

12 A. This Motion To Dismiss Is Timely

13 Pursuant to Federal Rule of Civil Procedure 12(b), a defendant may serve and
14 file a motion to dismiss on the grounds of lack of personal jurisdiction, improper venue
15 and failure to state a claim anytime before the answer or other responsive pleading is
16 filed. Aetna Life Ins. Co. v. Alla Medical Services, Inc., 855 F.2d 1470, 1474 (9th Cir.
17 1988). CHINA BOWL and HAN were personally served in Missoula, Montana by a
18 federal marshal on November 16, 2007 and the time to plead was 20 days thereafter,
19 i.e., on or before December 6, 2007. Therefore, this motion to dismiss is timely.

20 B. Plaintiff LU Has The Burden Of Proof On Jurisdiction And Venue

21 Although CHINA BOWL and HAN are the moving parties, plaintiff LU has the
22 burden of proof on the issue of personal jurisdictional. Rio Properties, Inc. v. Rio
23 International Interlink, 284 F.3d 1007, 1019 (9th Cir. 2002). Thus, CHINA BOWL and
24 HAN do not have to prove a lack of personal jurisdiction; rather, LU must prove the
25 existence of personal jurisdiction.

26 LU also has the burden of proof on the issue of venue. Hope v. Otis Elevator
27 Co., 389 F.Supp.2d 1235, 1243 (E.D. Cal. 2005) citing Airola v. King, 505 F.Supp. 30,
28 31 (D. Ariz. 1980). Thus, CHINA BOWL and HAN do not have to prove venue is

improper; rather, LU must prove venue is proper.

C. CHINA BOWL And HAN Are Not Subject to Either General or Specific Jurisdiction

Analysis of personal jurisdiction begins with the “long arm” statute in effect in the state in which the action is pending. Aanestad v. Beech Aircraft Corp., 521 F.2d 1298, 1300 (9th Cir. 1974). In California, the applicable statute is Code of Civil Procedure section 410.10 which authorizes California courts to exercise jurisdiction on any basis not inconsistent with the Constitution of the United States. Vons Companies, Inc. v. Seabest Foods, Inc., 14 Cal.4th 434, 444 (1996). “A state court’s assertion of personal jurisdiction over a nonresident defendant who has not been served with process within the state comports with the requirements of the due process clause of the federal Constitution if the defendant has such minimum contacts with the state that the assertion of jurisdiction does not violate ‘traditional notions of fair play and substantial justice.’” Id., citing International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); some internal quotations omitted.

A nonresident defendant has a liberty interest in not being subject to the judgments of a forum with which it has established no meaningful minimum contacts. Vons, supra, 14 Cal.4th at 445. As a matter of fairness, such a defendant should not be brought into a jurisdiction as a result of “random, fortuitous, or attenuated contacts.” Id. citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985); internal quotations omitted. The concept of minimum contacts ensures that states, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns and requires them to observe certain territorial limits on their sovereignty. Id. Such limits are necessary because each state has retained many essential attributes of sovereignty, including the power to try causes in their own courts. Id.

If a nonresident defendant’s activities may be described as “extensive or wide-ranging” or “substantial . . . continuous and systematic,” general jurisdiction will lie over the defendant, and in such circumstances, it is not necessary that the specific cause of

1 action alleged be connected with the defendant's business relationship to the forum.
2 Cornelison v. Chaney, 16 Cal.3d 143, 147-148 (1976). If, however, the defendant's
3 activities in the forum are not so pervasive, jurisdiction depends upon the quality and
4 nature of its activity in the forum in relation to the particular cause of action. Id. In such
5 a situation, the cause of action must "arise out of an act done or transaction
6 consummated in the forum," or defendant must perform some other act by which it
7 "purposefully avails" itself of the privilege of conducting activities in the forum. Id. As
8 the relationship of defendant with the state seeking to exercise jurisdiction over it grows
9 more tenuous, the scope of jurisdiction also retracts, and fairness is assured by limiting
10 the circumstances under which a plaintiff can compel it to appear and defend. Id.

11 Minimum contact for due process purposes requires more than a "foot-fall" within
12 the state; it requires at the very least an act by the defendant that produces an effect
13 within the state so as to make the exercise of jurisdiction reasonable. Belmont
14 Industries, Inc. v. Superior Court, 31 Cal.App.3d 281, 286 (1973). In deciding whether
15 jurisdiction reasonably may be assumed, a court must analyze the nature and quality of
16 defendant's activities in relation to the state. Id.; Fisher Governor Co. v. Superior Court,
17 53 Cal.2d 222, 225-226 (1959). This work requires consideration of the following: the
18 interest of the state in providing a forum for its resident and in regulating the business
19 involved; the relative availability of evidence and the burden of defense and prosecution
20 in one place rather than another; the ease of access to an alternative forum; the
21 avoidance of multiplicity of suits and conflicting adjudications; and the extent to which
22 the cause of action arose out of the defendant's activities in the forum state. Belmont,
23 supra, 31 Cal.App.3d at 286. In conducting this analysis, courts should bear in mind
24 that it is not the activity of parties other than defendant that gives rise to jurisdiction; it is
25 the purposeful activity of defendant in the forum state that guides the analysis. Id. at
26 228. As expressed by the US Supreme Court, the "unilateral activity of another party or
27 a third person is not an appropriate consideration when determining whether a defendant
28 has sufficient contacts with a forum State to justify an assertion of jurisdiction."

1 Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 417 (1984).

2 Based on the foregoing authorities, the lack of personal jurisdiction over CHINA
3 BOWL and HAN is manifest. They have absolutely no contact with California, let alone
4 the requisite minimum contacts. CHINA BOWL and HAN have never engaged in any
5 behavior or activity by which it can be remotely suggested that they purposefully availed
6 themselves of the privilege of conducting business, or the protection of the legal system
7 in California. CHINA BOWL and HAN have not left so much as a "foot-fall" within the
8 state.

9 In addition, the California courts still recognize the more traditional basis of
10 personal jurisdiction including: 1) service of process while defendant is physically
11 present in the state (Burnham v. Superior Court, 495 U.S. 604, 629 (1990)); 2) a
12 defendant domiciled in the state at the time the action is commenced (Milliken v. Meyer,
13 311 U.S. 457, 462-63 (1940)); 3) consent through voluntary appearance (Trans World
14 Airlines, Inc. v. Mattox, 897 F.2d 773, 786 (5th Cir. 1990)); 4) contractual consent
15 (National Equip. Rental, Ltd. V. Szukhent, 375 U.S. 311, 316 (1964)); and 5) consent
16 by designating a local agent for service of process (Knowlton v. Allied Van Lines, Inc.,
17 900 F.2d 1196, 1199 (8th Cir. 1990)).

18 None of these more traditional grounds for personal jurisdiction exist either.
19 CHINA BOWL and HAN were not physically present in California at the time they were
20 served with process. Neither was domiciled in California on the date the action was
21 commenced; neither was CHINA BOWL'S other officer, director and shareholder,
22 HAN'S wife. CHINA BOWL and HAN have not voluntarily appeared in an action in
23 California and the joining of the Rule 12(b)(3) and 12(b)(6) grounds for dismissal with
24 their motion to dismiss for lack of personal jurisdiction does not constitute a voluntary
25 appearance in this action, or act in any way as a waiver of the personal jurisdiction
26 issue. Wright v. Yackley, 459 F.2d 287, 291 (9th Cir. 1972). CHINA BOWL and HAN
27 have not contractually consented to jurisdiction, or designated a local agent for service
28 of process.

1 In summation, whether the more traditional grounds of acquiring jurisdiction are
2 considered, or simply the concepts of minimum contacts and purposeful availment, the
3 court does not have the requisite personal jurisdiction over CHINA BOWL and HAN.

4 **D. Venue Is Improper**

5 Pursuant to the jurisdictional allegations in the complaint, jurisdiction is premised
6 upon a federal question, i.e., Title VII of the Civil Rights Act of 1964 for employment
7 discrimination. Title VII has its own specific venue provisions. As stated by the Ninth
8 Circuit in Passantino v. Johnson & Johnson Consumer Products, Inc., 212 F.3d 493
9 (Wash. 2000):

10 Title VII authorizes suit "in any judicial district in the State in which the
11 unlawful employment practice is alleged to have been committed" as well
12 as in the district where employment records are kept, in the district where
13 the plaintiff would have worked but for the alleged unlawful practice, and,
14 if those provisions fail to provide a forum, in the district where the
15 defendant keeps its principal office. 42 U.S.C. § 2000e-5(f)(3); Johnson
16 v. Payless Drug Stores Northwest, 950 F.2d 586 (9th Cir.1991). ^{FN7} Some
17 courts have noted that "this broad provision for alternative forums was
18 necessary to support the desire of Congress to afford citizens full and
19 easy redress of civil rights grievances." Richardson v. Alabama State
20 Board of Education, 935 F.2d 1240, 1248 (11th Cir.1991). In fact, the
21 only limitation contemplated by the provision is that it seeks to "limit venue
22 to the judicial district concerned with the alleged discrimination." Stebbins
23 v. State Farm Mutual Auto Ins. Co., 413 F.2d 1100, 1102 (D.C.Cir.1969);
24 Ford v. Valmac Industries, Inc., 494 F.2d 330, 332 (10th Cir.1974).

25 Passantino v. Johnson & Johnson Consumer Products, Inc., 212 F.3d 493, 504
26 (Wash. 2000).

27 These special Title VII venue provisions control over the general venue
28 provisions of 28 U.S.C. section 1391. Johnson v. Payless Drug Stores Northwest, Inc.,
950 F.2d 586, 587-88 (9th Cir. 1991).

Base on the foregoing, venue is only proper in Montana. The unlawful
employment practices were all allegedly committed at the CHINA BOWL restaurant in
Missoula, Montana. Had plaintiff continued to work, he would have worked at the
CHINA BOWL restaurant in Missoula, Montana. All the employment records pertinent
to LU'S employment, as well as the records pertinent to his first age discrimination
claim are in Montana. Finally, CHINA BOWL and HAN are residents of the State of

1 Montana, not California. Thus, venue is only proper in a district court in the State of
2 Montana.

3 **E. ADEA Does Not Apply To CHINA BOWL And HAN Because**
4 **They Have Never Had 20 Or More Employees**

5 ADEA only applies to employers with 20 or more employees. 29 U.S.C. section
6 630(b); see Action Alliance of Senior Citizens v. Heckler, 789 F.2d 931, 934 fn. 1. The
7 complaint is identified as an employment discrimination complaint brought under Title
8 VII of the Civil Rights Act of 1964. There is no other claim pled in the complaint. As
9 such, absent a showing that CHINA BOWL and HAN have in excess of 20 employees,
10 the action must be dismissed.

11 **IV. CONCLUSION**

12 For all the foregoing reasons, CHINA BOWL and HAN respectfully request that
13 their motion to dismiss be granted. There is simply no basis of personal jurisdiction
14 over CHINA BOWL or HAN, venue is improper, and ADEA has no application to an
15 employer with less than 20 employees.

16 Dated: December 6, 2007

Respectfully submitted,

AARON & WILSON, LLP

17
18
19 By _____

ROBERT S. AARON

Attorneys for Defendants

CHINA BOWL, INC. erroneously sued
herein as "CHINA BOWL (Owner
QUAN HE HAN)" and QUAN HE HAN

AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO

I, Ryan J. Sullivan, declare:

I am a citizen of the United States, over 18 years of age and not a party to the within action. I am self-employed in the City and County of San Francisco; my business address is 150 Post Street, Suite 400, San Francisco, California, 94108.

On December 6, 2007, I served the attached and/or enclosed:

DEFENDANTS CHINA BOWL, INC. AND QUAN HE HAN'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

on all parties in this action, at the following address(es):

Shusen Lu
180 Peabody Street
San Francisco, CA 94134
Plaintiff In Pro Per

Service was accomplished by causing either an original or a true copy of the above-referenced document(s) to be distributed as follows:

☒ BY MAIL: I caused such document(s) to be placed in a sealed envelope, addressed as indicated above, with prepaid first-class postage thereon, and then placed the envelope(s) for collection and mailing, in accordance with the firm's ordinary business practice. I am readily familiar with the firm's ordinary business practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice correspondence for mailing is deposited with United States Postal Service on the date indicated for service, with prepaid first-class postage thereon.

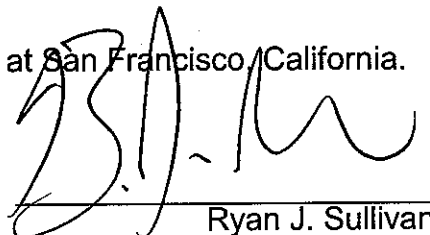
☐ BY HAND DELIVERY: I caused such documents to be hand delivered to the addresses indicated above.

☐ VIA FACSIMILE: I caused such documents to be transmitted via facsimile to the parties indicated above, at their respective facsimile numbers.

☐ VIA EXPRESS CARRIER: I caused such documents to be collected by an agent for the United States Postal Service, United Parcel Service, Federal Express or other overnight carrier, to be delivered by way of overnight mail to the addresses indicated above.

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed on December 6, 2007, at San Francisco, California.



Ryan J. Sullivan